No. 262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

GOODALL-SANFORD, INC., *Petitioner*

v.

UNITED TEXTILE WORKERS OF AMERICA, A.F.L. LOCAL 1802, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

SIDNEY W. WERNICK
85 Exchange Street
Portland, Maine

ARTHUR J. GOLDBERG
DAVID E. FELLER
1001 Connecticut Ave. N. W.
Washington 6, D. C.

Attorneys for Respondents

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STATEMENT

The petitioner here is Goodall-Sanford, Inc., a Maine corporation engaged in the manufacture and sale of textile products which move in interstate commerce. Until April 1955 it operated plants at Sanford and Springvale, Maine. (R. 39-40). It will be referred to herein as the Company.

The respondents are the United Textile Workers of America, A.F.L. (now affiliated with the AFL-CIO) and its Local 1802. They will be referred to herein collectively as the Union. The Union is the exclusive bargaining agent under the National Labor Relations Act for the production and maintenance employees of the Company at its Sanford and Springvale plants. (R. 39). On their behalf it entered into a collective bargaining agreement with the Company in October 1951. This agreement contained a typical grievance procedure, culminating in arbitration, for the resolution of disputes as to the "meaning and application of this

agreement" (R. 29). It also contained the usual provision that during the term of the agreement there should "be no resort to stoppages, slow downs, or other interference with the productive facilities of the company or to strikes or lockouts" (Art. XI, p. 41 of Exhibit A to the complaint).

The agreement was to have expired in 1953 but was renewed and amended at various times so that, as amended, it was to "continue in full force and effect" until July 15, 1955. (R. 40).

Beginning in December 1954 the Company began a process of liquidating these two plants. By April 1955 all production operations had ended and all of the real estate and building had been sold. (R. 33-34, 39-40).

During the process of curtailing production, the Company at various times notified groups of employees who had already been laid off that their employment was being terminated and that their names were being removed from the payroll records. (R. 38-39, 58). The Union protested these actions of the Company (R. 44-45), claiming that the Company had the right to lay off the employees but not to terminate them, thus preserving certain accrued rights as to fringe benefits which, under the contract, were payable to laid-off employees. Among these fringe benefits were insurance, pensions and vacations. Under the collective bargaining agreement insurance was required to be maintained in force for laid-off employees for the calendar month in which the layoff began and for one calendar month thereafter. (R. 14-19). The pension provisions of the collective bargaining agreement provided pensions for employees who reached the age of sixty-five and retired from employment with the Company. An employee with the required number of years of service who reached this age during a period of layoff was entitled to retire and receive a pension. (R. 20).

With respect to vacations, the collective bargaining agreement provided for vacation payments for all employees, in-

cluding those laid off during the vacation period, who had worked at least nine hundred hours in the twelve-month period from June 1 of the preceding year to May 31 of the vacation year. (R. 21-22, 26-28).

With respect to all of these provisions of the collective agreement it made a substantial difference to the employees whether their employment was regarded as terminated when the plant shut down, just as if they had quit or had been discharged, or if they were regarded as remaining in the status of laid-off employees. Under the collective bargaining agreement, the Union contended, termination of employment was specifically dealt with and it was there provided that such termination would occur only by virtue of a quit, discharge or absence from work for any reason (including layoff) for eighteen months. Hence, at least until the contract expired, the employees for whom no further work was available should be regarded as laid-off. Specifically, this meant that their insurance would be kept in effect for a month, that any employee who had served 20 years or more and who reached age 65 prior to July 15, 1955, would receive a pension, and that those employees who had earned a 1955 vacation by working 900 hours or more in the period since June 1, 1954, would receive their 1955 vacation pay. There was, of course, no attempt by the Union to require the Company to maintain operations or to provide actual employment.

The Union met at various times with the Company in an effort to resolve the dispute. (R. 44-45). These meetings proved unproductive of a settlement, and, on February 23, 1955, the Union notified the Company that it was requesting arbitration of the dispute in accordance with the provisions of Section B of Article VIII of the collective bargaining agreement. (R. 45).

In this article the parties agreed that any dispute not resolved in the grievance procedure "which relates solely to the meaning and application of this agreement . . . may

be referred to arbitration by written notice of either party to the other." They further provided that the arbitrator should be selected from a panel of three which had been agreed to by the Union and the Company and that the decision of the arbitrator so selected should be final and binding. (R. 29).

In its letter the Union submitted the names of the three persons who had arbitrated substantially all of the prior disputes between the Company and the Union during the last five years. (R. 45). The Company, however, refused to participate in the selection of an arbitrator and by letter dated March 8, 1955, notified the Union that it would not arbitrate the dispute since it did not regard the question of whether it had the right to terminate the employees as an arbitrable question under the collective agreement. (R. 46).

The Union thereupon, on March 15, 1955, filed its complaint in the present action. That complaint set forth the facts substantially as summarized above and, invoking Section 301 of the Labor-Management Relations Act, 1947, as the basis for jurisdiction, asked for an order compelling arbitration as well as other relief. (R. 8, 24). The Company's answer (R. 33-37) did not substantially dispute the facts as alleged in the complaint but argued that the Company had the absolute right to shut down all or any part of its business and, where there was no possibility of future reopening, to terminate its employees. This subject, the Company alleged, was not covered or attempted to be covered by the collective bargaining agreement and, therefore, the termination of the employees was not arbitrable under the contract.

The Union moved for summary judgment (R. 37) and the defendant moved to dismiss (R. 38) on the ground that, under the *Westinghouse* case, the district court did not have jurisdiction.

In an opinion dated June 1, 1955 (R. 39-49) and an

order dated June 13, 1955, the district court denied the company's motion to dismiss and granted the plaintiffs' motion for summary judgment. By its order (R. 49-51) the district court directed the parties to undertake to agree upon an arbitrator, provided that if they failed to so agree the court would itself designate an arbitrator, and directed that the parties submit the controversy, for final and binding arbitration, to the arbitrator so selected.

The district court rested its opinion that such relief was proper upon the provisions of Section 301 of the Taft-Hartley Act. It specifically held that the dispute between the parties as to the meaning and application of the collective bargaining agreement was arbitrable, finding that the dispute could be resolved only by interpretation of the various provisions of the agreement and that the contentions of the parties in respect thereto were not frivolous.

On appeal the Court of Appeals for the First Circuit first held that the order was appealable. It then proceeded to conclude, in accordance with its prior opinion in the *General Electric* case, now here on certiorari, No. 276, that there was no authority to compel arbitration by virtue of the provisions of Section 301 alone but that such authority could be found under the terms of the U. S. Arbitration Act. Examining the arbitration clause and relief ordered by the district court in terms of the Arbitration Act, the Court of Appeals concluded that the case substantially complied with the requirements of the Arbitration Act and that the relief actually granted, although not based on the Arbitration Act, was appropriate relief under that Act. Finally, as to the question of arbitrability of the controversy, the Court concluded that there was a real and substantial controversy which was arbitrable under the contract. It therefore affirmed the decree of the district court.

This Court granted certiorari on October 8, 1956, limiting its grant to the following questions set forth by the petitioner (R. 71):

1. Whether Section 301 of the Labor Management Relations Act of 1947 granted to the District Courts of the United States jurisdiction where no other ground for Federal jurisdiction is alleged or claimed.

2. Whether Section 301 of the Labor Management Relations Act of 1947 granted to the District Courts of the United States equitable jurisdiction to grant injunctions or compel specific performance of arbitration clauses in a collective bargaining agreement.

3. Whether the District Court has jurisdiction to decree specific performance of an agreement to arbitrate such a dispute, despite the prohibitions of the Norris-LaGuardia Act.

4. Whether the United States Arbitration Act, 9 U.S.C. Sec. 1 et seq. is applicable to an agreement to arbitrate in a collecteive bargaining agreement.

7. Whether a union may prosecute, by way of arbitration procedure in a collective bargaining agreement, the peculiarly personal rights of individual employees to recover vacation pay, and judicially compel arbitration for that purpose.

and the additional question noted by the Union in its response:

Whether an order of a District Court under § 4 of the Arbitration Act, directing the parties to perform an agreement to arbitrate, is a "final" decision from which an appeal may be taken under 28 U.S.C. 1291.

SUMMARY OF ARGUMENT

In our argument in this case we follow the form, adopted by petitioners, of discussing each of the six issues set forth in the questions to which the grant of certiorari was limited. In doing so, we have also sought to answer the arguments made by petitioner in the *General Electric* case, No. 276, without undue repetition of arguments already presented

to the Court on behalf of the petitioner in the *Lincoln Mills* case, No. 211.

I. Section 301 is clearly a jurisdictional grant and therefore it is no argument against 301 jurisdiction that no other statutory ground of Federal jurisdiction is claimed. The use of the term "procedural" by Mr. Justice Frankfurter in describing Section 301 in the *Westinghouse* case was not intended, fairly read, to mean that jurisdiction cannot be based on Section 301, although one panel of the Fifth Circuit, with one judge dissenting, has so held—contrary to the three judges who participated in the *Lincoln Mills* case, No. 211.

There can be no constitutional issue here because such an issue can only arise if it is assumed that state law governs and, if it is so assumed here, the case is ended before the constitutional question is reached. We concede that no relief would be available here under the law of Maine. Relief can be granted here only on the assumption that Section 301 and the United States Arbitration Act, taken together or separately as governing grievance arbitration agreements in industries affecting commerce, make such agreements enforceable irrespective of state law.

Without arguing whether this is a question of substance or procedure, or whether Federal or state law governs in general in Section 301 suits, we assert that—however these questions are resolved—it must be concluded that Congress intended that the company's promise, in a collective agreement, to arbitrate grievances must be enforceable as uniformly as the union promise not to strike for which it is the counterpart and consideration. The two promises are in essence one: the parties agree that, during the term of the agreement, all grievances shall be settled by arbitration instead of by strikes. Indeed, several Circuits have even inferred a no-strike promise from a simple agreement that disputes shall be arbitrated. Since we think it clear that Congress intended the no-strike agreement to be en-

forceable by way of a suit for damages irrespective of state law, we think it must be inferred that Congress also intended the enforceability of the agreement to arbitrate to be similarly decided without reference to state law.

II. Section 301 does encompass suits for equitable relief as well as for damages. The arguments to the contrary are based on short-hand Congressional expressions not intended to be precise definitions of the Section's scope. That these expressions were not so intended is shown most clearly by the fact that most of these same expressions refer only to suits for damages *against unions*—yet the words of the statute and the authoritative materials clearly show that it was intended to provide for suits by, and against, both employers and unions. Furthermore, the fact that the House proposed to exempt breach of contract suits from the Norris-LaGuardia Act clearly shows that it understood that equitable relief would be available. Five Circuit Courts of Appeals are now agreed, without dissent, that equitable relief is available in a Section 301 action.

Petitioner in No. 276 urges that even if some such relief can be granted in a 301 suit, specific performance of an agreement to arbitrate cannot be given because Congress in 1947 specifically decided against changing the common law rule of non-enforceability of such agreements. Congress made no such decision. There is no evidence whatsoever that Congress in 1947 adverted to the common law rule, or considered that it would be applicable in suits brought under Section 301. Petitioner's argument is based on an erroneous inference from the Congressional decision to entrust the enforcement of collective agreements solely to the courts rather than also to the National Labor Relations Board. This decision was merely a choice of forum, dictated by the dangers of conflict if both forums were available. The other materials in the legislative history of the 1947 Act relied on by petitioner in No. 276 are torn out of

context and are totally unrelated to the problem here presented.

Petitioner in No. 276 also urges that in the period between 1925 and 1947 Congress repeatedly and deliberately refused to make grievance arbitration enforceable. To prove this rejection it cites Section 7 of the Railway Labor Act, as well as a number of proposals which were introduced but not acted upon. None of the examples is apt. Indeed the Railway Labor Act *does* require the equivalent of arbitration of grievances. Petitioner has failed to distinguish, in this example as in all the other instances cited, between grievance arbitration and the arbitration of "major disputes"—disputes over what the terms and conditions of employment shall be.

The plain historical fact is that Congress has never assumed, either explicitly or implicitly, that the historical rule against the enforcement of arbitration contracts was applicable to collective agreements. Indeed, it is doubtful that prior to 1947 it recognized collective agreements, as distinguished from individual contracts of employment, as contracts at all. In did, in 1947, decide that such recognition should be given. There is no evidence that Congress at that time assumed that the common law rule with respect to commercial arbitration would then arise, like a springing use, to prevent enforcement of a grievance arbitration clause. To the contrary, it was necessarily implicit in the Congressional scheme that such clauses would be enforceable.

III. The Norris-LaGuardia Act does not bar the relief granted below. In addition to the argument set forth in petitioners' brief in the *Lincoln Mills* case, No. 211, we point out that five Circuit Courts of Appeal have now concurred in this conclusion without a single dissenting vote. To hold that the Act does bar relief would not lead to equality or mutuality of remedies but, rather, the grossest kind of inequity. Concededly, the Act does bar injunctive relief

considered the question to be solely one as to which forum should be used. The House conferees wanted the terms of the collective agreements to be subject to "interpretation and application" by the courts, not the Board. The Senate conferees recognized that, if both forums were available, there would probably be conflicts. Therefore, they both agreed that the appropriate forum should be the district court, without the slightest suggestion that the remedy of specific enforcement, which would have resulted from a Board proceeding, would not be available in court.

To buttress its argument as to the intention of Congress, petitioner in No. 276 relies on other materials wholly unrelated to the question here in issue. Thus, it quotes, on p. 47, a portion of the conference report dealing with Section 8(d) as if it were part of the discussion of the deletion of proposed Sections 8(a)(6) and 8(b)(5). Section 8(d) as it passed the Senate said that the duty to bargain included the duty to negotiate with respect to an agreement "or *the settlement of* any question arising thereunder."[18] The conferees eliminated the italicized words. In explaining this, the House Conference report said that the words in question "might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract,"[19] and hence they were deleted. It is perfectly plain that this whole sequence had nothing to do with arbitration at all and, if it did, the fear of the House conferees was that employers would be compelled, by the terms of Section 8(d), to agree upon that form of settlement of grievance disputes. The question of whether employers who had already so agreed could be compelled to live up to their agreements was obviously irrelevant to Section 8(d).

Equally irrelevant is the citation of unpassed bills pro-

[18] H.R. 3020, as passed the Senate, 1 Leg. Hist. (1947) 242.

[19] House Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 35; 1 Leg. Hist. (1947) 539.

viding for "compulsory arbitration in certain labor disputes." [20] Compulsory arbitration—in the sense of a rule outlawing strikes and compelling arbitration as a device for settling unresolved disputes as to what the terms of a contract shall be—is totally different from the enforcement of voluntary agreements to arbitrate grievances arising under a contract.

The fact that Congress did not decide to adopt a system of compulsory arbitration as a method for settling disputes as to what wages or contract terms should be imports nothing as to the intention of Congress with respect to the enforcement of voluntary agreements to arbitrate disputes as to the application or interpretation of existing agreements.

D. The Claim That Congress Has Repeatedly Expressed the View That Arbitration Provisions in Collective Agreements Should Not Be Enforceable.

In support of its contention that Congress in 1947 specifically decided that it should not provide for the enforceability of the arbitration provisions of collective agreements, as well as its contention that such agreements are excluded from the Arbitration Act, petitioner in No. 276 repeatedly asserts that the whole history of labor and arbitration legislation, from 1923 through 1947, reveals a Congressional "judgment that agreements to arbitrate labor controversies should not be specifically enforceable." [21]

Petitioner is able to make this kind of sweeping statement only because it again fails to distinguish between grievance arbitration, under an agreement providing for arbitration of disputes as to its application and interpretation, and what we have called contract arbitration. (See Brief for Petitioner in No. 211 at pp. 21-22).

Thus much is made of the fact that in the Railway Labor Act, and particularly §7, Congress provided only for "volun-

[20] Brief for Petitioner in No. 276, pp. 47-48.

[21] Brief for Pet. in No. 276, p. 39. See also pp. 19-22, 28-29, 39-40.

tary arbitration" and said that the failure to arbitrate "shall not be construed as a violation of any legal obligation." 45 U.S.C. § 157. From this it is argued that Congress intended to maintain the rule that agreements to arbitrate are not enforceable.

This compounds confusion. First, as this Court patiently explained in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722-728, the Railway Labor Act sharply distinguishes between "disputes over grievances and disputes concerning the making of collective agreements." 325 U. S. at 722. Under the Railway Labor Act grievance disputes are traditionally referred to as "minor disputes" and disputes concerning the making of an agreement are referred to as "major disputes." In railway terminology, what we have in this case, and in Nos. 211 and 276, is a "minor dispute."

Now, in the Railway Labor Act, Congress itself provided for a statutory arbitration system for settling minor disputes through the mechanism of the National Railroad Adjustment Board. No employer can refuse to permit grievances to be heard and decided through its procedures. But, as to major disputes, as this Court noted, Congress did retain the "traditional voluntary processes of negotiation, mediation, *voluntary arbitration*, and conciliation." [22] " 'Major disputes' go first to mediation under the auspices of the National Mediation Board; if that fails, then to acceptance or rejection of arbitration, cf. § 7. . . ." [23]

Section 7 of the Act deals with agreements to arbitrate specific controversies. It does not cover a general agreement that grievances shall be arbitrated. No such agreement is necessary under the Act because the Act itself provides the statutory grievance procedure of the Adjustment Board, with its provision for the appointment of neutrals where the representatives of the parties are unable to agree, 45 U.S.C. § 153, First (l). But, even passing the fact that petitioner

[22] 325 U.S. at 725, emphasis added.

[23] *Ibid.*

is referring to the wrong kind of arbitration, the fact is that the Railway Labor Act *does* make an agreement to arbitrate even a major dispute binding and irrevocable. The words in § 7 quoted by petitioner were inserted to make it clear that there is no obligation to agree to arbitration in the first place. But the statute also provides, in § 8, that an agreement to arbitrate, once it is made, "shall not be revoked by a party to such agreement." 45 U.S.C. § 158.

These provisions, says petitioner in No. 276, show that "on the occasions, prior to 1947, when Congress considered arbitratoion legislation it clearly revealed its judgment that agreements to arbitrate labor controversies should not be specifically enforceable." To the contrary, we say, if these provisions show anything they show that Congress' judgment has consistently been that grievances ought to be arbitrated and that the parties to agreements to arbitrate should not have "the power, if not the right, to defeat the intended settlement of grievances by declining to join" in the arbitration process. *Elgin, J. & E. R. Co.* v. *Burley*, supra, at pp. 725-726.

Similar comments apply to the petitioner's reliance on the 1928 proposals of the American Bar Association, the proposed arbitration provisions in the Wagner Act which were abandoned in 1935, and the failure of Congress to enact a 1942 bill dealing with "labor arbitration" (S. 2350, 77th Cong., 2d Sess.) which, according to petitioners, would "provide judicial enforcement of arbitration clauses in collective agreements," [24] as well as its reliance, in connection with the Arbitration Act, on union opposition to the Kansas Industrial Relations Court Act of 1920.[25]

In none of these instances was attention focused on the question of whether the common law rule against enforcement of arbitration provision should be applied to collective agreements. Indeed, it is highly dubious that in the 1920's

[24] Petitioner's Brief in No. 276, p. 21.
[25] *Id.* at p. 15.

anyone seriously considered a collective agreement as a contract which could be enforced in any way—a defect which Congress remedied in 1947. What was really involved in the schemes proposed in the 20's was "industrial arbitration"—a method of settling disputes as to what wages, hours and working conditions should be by rate-setting machinery similar to that provided for public utilities, instead of by free collective bargaining.[26] And even where it was proposed to make such a system voluntary rather than compulsory, again the proposal was, as in the 1942 bill, to provide a mechanism for providing arbitration "to settle . . . any controversies concerning past, present or future rates of pay, wages, hours of employment and any other and different past, present or future terms or conditions of employment." S. 2350, 77th Cong., 2d Sess., § 2A, 88 Cong. Rec. 2073.

The plain historical fact is that Congress never explicitly considered the question of whether the common law rule against enforcement of agreements to arbitrate disputes under existing contracts was applicable to collective bargaining agreements. If, prior to 1947, it was assumed that such arbitration provisions were not enforceable it was because it was assumed that collective agreements were not contracts at all. The common law rule had been abolished in the Federal Courts by the United States Arbitration Act (except for the individual employment contracts of seamen and similar workers).

It was not until 1947 that Congress decided, in Section 301, that "statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step."[27] But even then, no explicit attention was given to the enforceability of a promise to arbitrate grievances contained in such an agreement. It is therefore necessary to derive from the general purposes of Section 301

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[26] See 50 A.B.A. Rep. 362-363 (1923).

[27] S. Rep. No. 105, 80th Cong., 1st Sess., p. 17; 1 Leg. Hist. (1947) 423.

what Congress would have intended if it had explicity considered the question.

As to that, we have no doubt. As is set forth in petitioner's brief in the *Lincoln Mills* case, No. 211, at pp. 39-45, the clear Congressional intention in Section 301 was to promote industrial peace by assuring that, once the parties entered into an agreement providing that there should be no strikes but that disputes as to its application would be arbitrated, the agreement would be performed.

When it said that collective agreements should be mutually enforceable like other contracts, Congress certainly did not mean or intend that the common law rule against arbitration, which had been abolished for other contracts, should be resurrected to defeat Congress' avowed purpose. Necessarily implicit in its passage of Section 301 was the assumption that the agreement to arbitrate, which is the counterpart and consideration for the agreement not to strike, would be enforceable in the Federal courts.

III WHETHER THE DISTRICT COURT HAS JURISDICTION TO DECREE SPECIFIC PERFORMANCE OF AN AGREEMENT TO ARBITRATE SUCH A DISPUTE, DESPITE THE PROHIBITIONS OF THE NORRIS-LAGUARDIA ACT.

Our argument on this point is set out fully in petitioner's brief in the *Lincoln Mills* case, No. 211, at pp. 18-23. We respectfully refer the Court to that brief. We wish to note here only two additional points.

First, in addition to the First, Fifth and Sixth Circuits, the Third and Seventh Circuits have now also held that the Norris-LaGuardia Act does not bar equitable relief to compel an employer to comply with the terms of a collective bargaining agreement. *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (3d Cir. 1956); *United Steelworkers of America* v. *Galland-Henning Mfg. Co.*, 39 LRRM 2384 (7th Cir., Feb. 4, 1957). In the *Galland-Henning* Case, the Seventh Circuit unfortunately

joined the Fifth in holding that the Federal district courts cannot enforce an agreement to arbitrate in a § 301 suit if such an agreement would not be enforced by a state court. But it explicitly overruled the decision of the district court in that case that such relief was barred by the Norris-LaGuardia Act. 39 LRRM at 2386. No Court of Appeals is to the contrary and, indeed, in none of these cases nor in any of the earlier decisions was a single dissent expressed on this point.

Second, a word should be said about the heavy emphasis placed by petitioner in No. 276 upon the argument that it would be both unfair and contrary to the chief object of Congress, in 1947, to provide for equality between unions and employers, to hold that the Norris-LaGuardia Act does not bar equitable relief here. The union's agreement not to strike but to arbitrate is unenforceable because of the Norris-LaGuardia Act, petitioner says. Therefore, the only fair result, and the only result consistent with the theory of equal obligation contained in the 1947 Act, is to say that the employers promise to arbitrate is similarly barred. (Petitioner's Brief in No. 276, pp. 64-65.)

What this argument forgets to note is that Section 301 does give the employer a remedy in damages for any loss it may suffer as a result of a strike in violation of a collective agreement. And while it can be argued that this remedy is not quite as effective as an injunction against the strike, it is a substantial and effective remedy. Substantial damages can be recovered if they have been caused by the strike, as in *Teamsters* v. *W. E. Mead, Inc.*, 230 F. 2d 576 (1st Cir. 1956) ($359,000).

But, if petitioner is correct, there would be no remedy at all for a union if the employer refused to perform his agreement to arbitrate grievances. Under the common-law rule which petitioner so vigorously espouses, only nominal damages can be recovered for breach of an agreement to arbitrate. *Munson* v. *Straits of Dover S. S. Co.*, 99 Fed. 787

(S.D. N. Y., 1900) *aff'd* 102 F. 926. *Aktieselskabet Korn- og Foderstuf Kompagniet* v. *Rederiaktiobologet Atlanten*, 250 Fed. 935 (C.C.A. 2, 1918) *aff'd* 252 U.S. 313. And, even if the common law rule should be held inapplicable to grievance arbitration, a remedy in damages would be virtually meaningless for a union. How could such damages be shown? And how would they be measured?

Contrary to petitioner's argument, the really one-sided result would be the result it argues for. In that case, an employer could be made whole for any losses it suffered because of a union's violation of its no-strike agreement, but the union would be utterly unable to obtain the consideration for which it made the promise not to strike. The balanced policy which petitioner urges Congress intended will in fact be effectuated if the Court holds that either party, company or union, can specifically enforce an agreement to arbitrate grievances but that neither company nor union can obtain injunctive relief against a strike or lock-out.

IV—WHETHER THE UNITED STATES ARBITRATION ACT IS APPLICABLE TO AN AGREEMENT TO ARBITRATE IN A COLLECTIVE BARGAINING AGREEMENT.

The applicability of the United States Arbitration Act in a suit brought under Section 301 involves a whole series of separate questions:

A. Whether a collective bargaining agreement is a contract "evidencing a transaction involving commerce" within the meaning of Section 2.

B. Whether a collective bargaining agreement is a "contract of employment" within the meaning of the exclusion in Section 1.

C. Whether the exclusion in Section 1 shall be construed as covering only contracts of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" or shall be construed

more broadly to cover all workers engaged in production affecting commerce.

D. Whether an order to compel arbitration under Section 4 can only be issued if the Court has jurisdiction under Title 28 of the U.S. Code.

E. Whether an order to compel arbitration under Section 4 can be issued in a case in which, under *Westinghouse*, the union could not bring suit if there were no agreement to arbitrate.

Petitioner in this case basically argues only issue D. It also argues that, however issues B and C are resolved, it is clear that Congress did not intend the United States Arbitration Act to be applicable to collective bargaining agreements. Petitioner in the *General Electric* case, No. 276, argues all five of the questions, although without clearly separating some of them.

Argument has already been presented to the Court on most of these issues in petitioners' brief in the *Lincoln Mills* case, No. 211, at pp. 50-60. We respectfully refer the Court to that brief and will here add only such additional argument as we think is made necessary by the arguments presented by petitioner in this case and petitioner in No. 276.

A. Whether a Collective Bargaining Agreement Is a Contract "Evidencing a Transaction Involving Commerce" Within the Meaning of Section 2.

Petitioner in No. 276 argues that the Court below erred in assuming that a collective bargaining agreement was a contract "evidencing a transaction involving commerce." Without clearly separating its arguments on this issue from its arguments with respect to the exclusion of contracts of employment, it appears to argue that the language "evidencing a transaction" was peculiarly suited to the intention of Congress to provide for the enforceability of arbitration in commercial contracts and that it is simply not apt to read

that language as covering a collective bargaining agreement.

Unfortunately this argument, logically pursued, directly conflicts with the petitioner's argument as to the meaning of the exemption of "contracts of employment". The exemption was added after the bill was originally introduced and petitioner argues strongly that it came as a result of the objection of the International Seamen's Union to the effect of the bill as first proposed on arbitration clauses in collective bargaining agreements. As has been pointed out elsewhere [28] this contention is erroneous: the objection was to the effect of the bill on individual contracts of employment. Specifically, the concern of the Seamen's Union was with the contracts embodied in the individual shipping articles which are signed by every seaman. But the fact that the bill, without the exemption, concededly would have covered contracts of employment, as well as collective agreements, clearly negates the contention that such contracts do not "evidence a transaction involving commerce."

B. and C. Whether the Exclusion of "Contracts of Employment of Seamen, Railroad Employees, or Any Other Class of Workers Engaged in Foreign or Domestic Commerce", Makes the Arbitration Act Inapplicable

This exemption concededly was written into the Act at the instance of the International Seamen's Union. But it is not true, as petitioner in this case claims, that at the time the Arbitration Act was passed "the only contracts involving seamen which contained arbitration clauses were collective bargaining contracts and not individual hiring contracts." [29] To the contrary, as has been explained in petitioners' brief in No. 211, at pp. 53-58, the contracts containing arbitration clauses with which the Seamen's Union was concerned were precisely the individual hiring contracts.

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[28] Brief for Petitioner in No. 211, pp. 53-58.

[29] Petitioner's Brief in No. 262, p. 20.

The entire argument, set forth in the briefs in all three cases here, as to whether Congress meant, by the exemption of contracts of employment, to refer to individual contracts of hire or to collective agreements, seems to us to pose a false issue. The issue is false because it reads back into the legislative history of the 20's an awareness of the status of a collective agreement as a separate contract which simply did not then exist. Whatever theory may today commend itself to Congress or the courts as to the status of a collective agreement, it seems fairly clear that thirty years ago there was no general recognition of any such theory. Contracts of employment—in the sense of individual contracts of hire—were the only contracts recognized as such.[30] And it is asking too much to read the legislative background of the United States Arbitration Act with a microscope to see

[30] Mr. Justice Brandeis seems to have regarded the collective agreement as simply an agreement made by the union as agent for the employees, not as a separate agreement with the union as such. ". . . the workingmen's agreement is made not by individuals directly with the employer, but by the employees with the Union and by it, on their behalf, with the employer . . ." *Hitchman Coal & Coke Co. v. Mitchell*, 243 U.S. 229, 270 (dissenting opinion).

Some such theory seems to be the explanation of Andrew Furuseth's remarks, relied on by petitioner in No. 276, with respect to the application of the proposed Act to union agreements. His concern, as we have pointed out in our brief in the *Lincoln Mills* case, No. 211, at pp. 53-58, was with the individual hiring contracts of seamen and the economic pressure which would cause them to sign shipping articles containing arbitration provisions. Having made this point, he then asked, in the passage quoted by petitioner, whether union organization would make any difference. In answering this question, he first said —as quoted by petitioner—that the organization would be bound. But this was not his concern. His concern was with the individual contracts of employment. Hence, he immediately asked: "But would such action bind the members?" (Proceedings, 24th Convention of the International Seamen's Union of America (1921) p. 204). And he answered this question by arguing that the Courts might hold that, on an assumed analogy to corporation law, the action of the union would bind the individual members. Clearly he meant by this analogy that the agreement to arbitrate would be deemed to be included in the individual member's "contract of employment."

if Congress intended to exempt from the Act a kind of an agreement which it would not even have recognized as a contract.

In 1947 Congress decided that a collective agreement not only should be given recognition as a contract, independent and separate from the individual contracts of employment, but also that such an agreement should be enforceable in the Federal courts. How is this Court, then, to treat the exemption which was written in an earlier era? This depends, we believe, on how much force the Court will give to Section 301 standing alone. We believe that, even without reference to the Arbitration Act, Section 301 is a sufficient basis upon which to conclude that the promise to arbitrate grievances is specifically enforceable. But, if the Court should not so conclude, then at the very least it should conclude that the statutory recognition of the collective agreement as a contract, separate and apart from the individual's contract of employment and enforceable as such against the union, not its members, is a sufficient basis upon which to decide that the exemption of "contracts of employment" in the Arbitration Act does not apply to it.

D. Whether an Order to Compel Arbitration Under Section 4 Can Only Be Issued If the Court Has Jurisdiction Under Title 28 of the U.S. Code

This question need not be considered at length. It rests, essentially, on the fact that Congress did not put § 301 in the Judicial Code. Certainly the reference in Section 4, as originally enacted, to jurisdiction "under the judicial code at law, in equity or in admiralty" was not meant to apply to anything less than the full range of federal jurisdiction then existing. The later amendment which substituted the words "Title 28" in Section 4 was not intended to make any substantive change whatsoever.

In any case, even if Section 4 should be held inapplicable on any such hypertechnical reading of its words, Section

2 of the Arbitration Act remains applicable. Section 2 establishes the general principle that agreements to arbitrate "shall be valid, irrevocable, and enforceable." Section 4 simply provides a simplified procedure, by petition, and on only five days' notice, by which to obtain an order directing arbitration. If it is inapplicable, then parties seeking to enforce arbitration provisions will be required to proceed in the normal manner by complaint and motion for equitable relief, as the plaintiffs in fact did in this case. The agreement is nonetheless enforceable if the Act is applicable, and the decision below is correct.

E. Whether an Order to Compel Arbitration Under Section 4 Can Be Issued in a Case in Which, Under Westinghouse, the Union Could Not Bring Suit If There Were No Agreement to Arbitrate

This question can briefly be disposed of, and on the same principle as the prior question. If the *Westinghouse* case is to be given a broad interpretation (see Point V below) and Section 4 is to be read narrowly, then the expedited procedure provided in Section 4 might be held inapplicable if the underlying grievances concern wage claims for which the union could not sue absent an agreement to arbitrate, but applicable if the grievances concern other matters for which the union could sue. This may not seem to be a reasonable rule. But it is not important for the result in this case, since the Section 4 procedure was not used.

V—WHETHER A UNION MAY PROSECUTE, BY WAY OF ARBITRATION PROCEDURE IN A COLLECTIVE BARGAINING AGREEMENT, THE PECULIARLY PERSONAL RIGHTS OF INDIVIDUAL EMPLOYEES TO RECOVER VACATION PAY, AND JUDICIALLY COMPEL ARBITRATION FOR THAT PURPOSE.

If this Court should affirm the judgment below, either on the Circuit Court's ground that the Arbitration Act is applicable in a § 301 action, or on the ground adopted by the District Court that § 301 is itself a sufficient basis, then the

order of the District Court directing the Company to proceed to arbitrate in accordance with its agreement will become effective. In that arbitration, the Union may be successful in obtaining a decision that the Company had no right to terminate its employees *instanter* but was required to treat them as laid-off. If the arbitrator should so decide then, under the collective agreement, some of these employees would become entitled to the vacation pay which they earned prior to their purported termination by the Company. Others may become entitled to pensions if they had served the required number of years of service and reached the required age subsequent to their termination by the Company and prior to July 15, 1955.

Ultimately, then, the consequence of the Union's suit here may be the securing of vacation pay and pension rights for some of the employees. Therefore, argues petitioner in this case (Brief, pp. 21-23), this is a suit to enforce the personal rights of the employees and is not cognizable under § 301(a) under the rule laid down in the *Westinghouse* decision. The same argument is made in the *General Electric* case, No. 276 (Petitioner's Brief, p. 52) because there the questions to be arbitrated are a discharge and a job classification dispute.

There are two answers to this argument. The first, and simplest, is that this is *not* a suit to recover vacation pay or pensions and No. 276 is *not* a suit to have an employee reinstated or a job classification changed. In both cases, the breach of the collective agreement which is sought to be remedied is the refusal to perform the promise to arbitrate. If that promise is performed and if, in the arbitration, it should be held that the Company did not correctly interpret and apply the collective agreement, then the individual employees may have personal rights. But at this stage the Union is not seeking to litigate those rights. It is seeking only performance of the promise made to it, and not to the employees individually, to arbitrate.

This first answer is sufficient and, we believe, unanswerable. But concededly it may lead to a rather odd result. If the Union's position is upheld in arbitration, and if the *Westinghouse* case is to be read as the petitioners in this case and in No. 276 read it, then the Union may be able to compel arbitration but not enforcement of the arbitrator's award. This is a permissible result but, we think, not a desirable one.

The better answer to petitioner's contention is to read the *Westinghouse* case much more narrowly than petitioners in these cases do. In *Westinghouse*, it was alleged simply that the employer had failed to pay salaries due and owing to the employees under the terms of the collective agreement. Although in fact the underlying conflict was one of interpretation of the collective agreement, no such controversy was alleged; the complaint merely set forth that "Defendant failed and refused to pay" the employees and that such failure constituted a violation of the collective agreement.[31]

It is possible to read the *Westinghouse* case, therefore, as covering only the case in which a union seeks to enforce, through judicial process, the claim of an individual employee for wages which the employer simply refuses to pay. Obviously such cases can and do arise. And there are also many cases in which there is only a factual dispute such as whether the employee actually worked the hours for which the company refuses to pay.

In those cases it is possible to say, as the Chief Justice and Mr. Justice Clark said, that a suit by the union would be simply a suit to enforce "the uniquely personal right of an employee . . . to receive compensation for services ren-

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[31] Record, *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, No. 51, October Term, 1954, p. 6. The complaint also, it is true, asked for declaratory relief as to the meaning of the contract but this Court treated the case as if this prayer did not exist.

dered." 348 U.S. at 461. It is possible to say, as Mr. Justice Reed said, that the duty to pay wages is a duty owing to the employee not to the union. 348 U.S. at 464. And it is also possible to say, as Mr. Justice Frankfurter said, that the grievances are "peculiar in the individual benefit which is their subject-matter." 348 U.S. at 460.

But entirely different considerations appear where the union alleges not simply a refusal to pay but that the failure to pay resulted from the application by the employer of a rule of interpretation of the collective agreement contrary to the intent and purport of that agreement. In such a case, the union alleges much more than a violation of the employee's personal right to receive compensation. It alleges a genuine dispute between the contracting parties as to what their contract means. And, if the *Westinghouse* case is read narrowly, it does not hold that the union cannot bring suit to obtain an adjudication of that controversy.

What we are saying, simply, is that a difference can be found between a case in which the claim is that the employer simply refuses to pay in accordance with the agreement and a case in which the claim is that the employer has, in effect, amended the agreement. Clearly if the claim was that the employer had actually adopted a unilateral change, applicable to all in the future in the wage rates or other conditions upon which he had agreed in the collective agreement, he would breach his contract with the union, and more than the "uniquely personal" rights of the particular employees first affected would be involved. When the union claims that the employer has followed a rule of application and interpretation which is contrary to the agreement it in effect makes a similar claim.

The *Westinghouse* case can be read, we believe, as simply not covering that kind of case. If it is so read, at least some of the difficulty with the case disappears. The union will have the right to vindicate its own interest, as the collective representative of all the employees, in the agreements which

against a union strike in violation of an arbitration-no strike provision. But an effective remedy in damages exists. Indeed, one of the specific objectives of Section 301 was to provide such a remedy. But a union cannot recover damages for a company violation of the promise to arbitrate. The only method of achieving the balanced effect which Congress intended in 1947 is to hold that the Norris-LaGuardia Act does not bar specific enforcement, at the behest of either party, of the agreement to arbitrate.

IV. The arguments presented by petitioners in this case and in No. 276 against reliance on the Arbitration Act are erroneous. The argument that collective agreements do not "evidence a transaction involving commerce" seems inconsistent with the argument that the exemption of "contracts of employment" was necessary to exclude such agreements from the Act.

With reference to the exemption itself, it seems to us that the effort, on both sides, to find whether Congress intended to include in the exemption union agreements, as opposed to individual contracts of hire, is bound to fail since it is highly doubtful that in 1925 Congress would have regarded the union agreement, as such, to be a contract at all and hence the question could not even arise. The problem is created because, in 1947, Congress decided to give statutory recognition to the union agreement as such. In light of its expressed purpose then, we think it illogical to conclude that Congress intended this newly recognized form of contract to be included in the 1925 exemption of "contracts of employment."

The arguments as to Section 4 of the Arbitration Act are irrelevant, since the expedited procedure there provided was not used in this case.

IV. The arguments presented by petitioners in this case mate result may be that it will be decided in the arbitration ordered that certain employees are entitled to benefits. It

does not follow, however, that these suits are barred by the *Westinghouse* decision, even if that decision is broadly read, since the object of the suits in all three cases now before the Court is not to recover the benefits for the individual employees but to vindicate the promise to the union that grievances will be arbitrated. This fact sufficiently serves to distinguish the *Westinghouse* case.

A better distinction, however, is to read the *Westinghouse* case much more narrowly than petitioners in these cases do. *Westinghouse*, we believe, can properly be read as simply excluding from the scope of Section 301 those suits in which a union claims that an employer has failed and refused to pay the compensation provided in the collective agreement. Where, as here, the claim is not simply that the employer has refused to provide benefits but is a claim that the company has adopted a rule of interpretation, applicable to all employees, which is contrary to the intent and purport of the collective agreement, a genuine controversy with the union as to its agreement with the employer is involved. In such a case, more than the "uniquely personal right" of a particular employee is involved and the controversy is not "peculiar in the individual benefit" which is its subject matter. Therefore, we believe, the *Westinghouse* case should not be read as excluding such a case.

VI. The question of whether an order directing arbitration is a "final" decision from which an appeal may be taken under 28 U.S.C. 1291 only arises if the Court relies upon the Arbitration Act as the authority for granting the remedy sought here. It is possible to hold, as the Second Circuit has, that in a commercial arbitration the order to arbitrate is merely a step in the litigation between the parties and is therefore not a final decision from which an appeal can be taken if the original cause of action is equitable in nature. The rule of *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, can be argued to be applicable in a case begun by petitioner for an order directing arbitration

as well as in a case in which a suit is stayed pending arbitration.

On the other hand, in a grievance arbitration it seems fairly clear that the order directing arbitration is in fact the full and final relief requested by the plaintiff. This serves, we believe, to emphasize our view that grievance arbitration is so different from commercial arbitration that the historical rule against enforceability of abitration agreements is simply inapplicable and, hence, no recourse is needed to the provisions of the Arbitration Act. If the Court should disagree with this view, and hold the Arbitration Act applicable, the question of appealability which was raised *sua sponte* by the Court of Appeals will have to be decided here. We express no opinion on that issue.

ARGUMENT

INTRODUCTION

Petitioner here has presented its argument in the form of answers to each of the six specific questions to which the Court has limited its grant of certiorari. As respondents we will also follow this form, first discussing the issue presented by each question and then answering the specific arguments made by the petitioner. Since the disposition of these questions by the Court of Appeals for the First Circuit in the present case rested on its earlier decision in *Local 205* v. *General Electric Co.*, 233 F. 2d 85, which is also before the Court in No. 276, we will also attempt, within this form, to answer the arguments against that holding presented by petitioners in their brief in No. 276.

I—WHETHER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 GRANTED TO THE DISTRICT COURTS OF THE UNITED STATES JURISDICTION WHERE NO OTHER GROUND FOR FEDERAL JURISDICTION IS ALLEGED OR CLAIMED.

A. The Question

The issue here tendered, as the question is formulated by petitioner, seems to be whether Section 301 is to be inter-

preted as a grant of Federal jurisdiction in any case. If there is no jurisdiction under Section 301 in this case because "no other ground for Federal jurisdiction is alleged or claimed," then there can never be a case in which jurisdiction can be said to be based on Section 301.

Although no substantial argument is made by petitioner in support of the proposition that § 301 is not a jurisdictional grant, there is language in the opinion of Mr. Justice Frankfurter in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, which, if read without regard to the balance of the opinion, can be cited in support of that position. Thus, the opinion states that the section should be read as merely giving "procedural directions" to the Federal Courts (p. 443) that the authoritative materials indicate the "strictly procedural aim of the section" (p. 447), and that as a whole the legislative history reinforces the meaning of the statute "as a mere procedural provision" (p. 449). However, the balance of the opinion makes it clear that the word "procedure" in all of these cases was used only as the antithesis of the word "substance" and that it was not meant to be implied that, with respect to cases found to be within its scope, the section was not to be read as a jurisdictional grant. Thus, at p. 442, the question is said to be the ascertainment of the "jurisdictional scope" of the section, at p. 449 the constitutionality of a "grant of jurisdiction over a contract governed by state substantive law" is presented as a problem and finally, at the end of the opinion, it is concluded only that in the light of the right of the employees to sue in a state court, Section 301 should not be construed as conferring "jurisdiction over a suit such as this one." (p. 461).

Fairly read, therefore, Mr. Justice Frankfurter's opinion in the *Westinghouse* case gives no support to the proposition that the District Court had no jurisdiction here under § 301 simply because there was no other ground for Federal jurisdiction. Nothing in the other opinions, of course, even

intimates that result. And the language and legislative history, whatever may be its other ambiguities, is perfectly clear in granting jurisdiction to the Federal courts to hear the cases coming within the scope of the section.

We should point out to the Court, however, that in *I.L.G.W.U.* v. *Jay-Ann Co.*, 228 F. 2d 632 (1956), two judges of the Court of Appeals for the Fifth Circuit seem to have adopted a position strikingly similar to that implied in petitioner's question.[1] Adopting a restrictive reading of the "procedural" language of Mr. Justice Frankfurter's opinion, they held that jurisdiction cannot be found in a Section 301 suit unless the requisites of orthodox "federal question" jurisdiction under 28 U.S.C. 1331 (except the amount in controversy) exist. However desirable this reading of Section 301 may be—since it would eliminate from the scope of Section 301 virtually all suits for damages against unions—it seems inconceivable to us that either the language or the legislative history of Section 301, and particularly Section 301(a), can reasonably be argued to justify it.

B. The Petitioner's Argument

Petitioner does not offer any argument in support of the contention, implied in its question, that Section 301 does not constitute a grant of jurisdiction where no other basis for federal jurisdiction is alleged or claimed. Instead, it appears to argue, first, that there is constitutional doubt as to the validity of § 301 and, second, that, if the section is assumed to be constitutional, state law must govern as to the availability of specific performance of an agreement to arbitrate.

1. The Constitutional Issue

The constitutional issue is dealt with in the brief which counsel for respondent in this case have filed on behalf of the

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[1] The opinions of all three judges in the Fifth Circuit's decision in *Lincoln Mills* v. *Textile Workers Union*, 230 F. 2d 81, now before this Court in No. 211, are to the contrary.

petitioners in the *Lincoln Mills* case, No. 211, at pp. 48-50. We will not repeat here what we have there set forth. We should like to add, however, one additional point which may serve to dispense with the necessity of any discussion of the issue.

In *Westinghouse* the constitutional question was raised in Mr. Justice Frankfurter's opinion only because, in his view, granting the relief there sought would necessarily present that issue. Therefore, "through the orthodox process of limiting the scope of doubtful legislation" (p. 459) the statute was construed as not covering the case in question.

Here the converse is true. If this Court should conclude that the relief here sought—enforcement of the agreement to arbitrate—can be granted then no possible constitutional issue can be presented. Whether the result is reached by relying on § 301 alone, or by relying on § 301 for jurisdiction and the U. S. Arbitration Act for the remedy, the net result will be that by virtue of the impact of statutes enacted by Congress regulating interstate commerce an agreement which would not be enforceable under state law will be enforced. However this result is reached, no constitutional objection can be interposed. For the case is then clearly one arising under "the laws of the United States" regulating commerce.

The constitutional question posed by Mr. Justice Frankfurter in *Westinghouse* could only arise if the Court first decided that the question of whether the agreement to arbitrate should be enforced was to be decided by reference to state law. But if the Court should so decide, the case is ended and the constitutional question is never reached, since we concede that, under Maine law, no such remedy is here available.

2. *Whether State or Federal Law Governs*

Petitioner argues that this Court's decision in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956) requires the conclusion that state law as to the enforceability of agreements

to arbitrate must govern in this § 301 case. The *Bernhardt* case, of course, requires no such result. It holds simply that, in a suit which is heard in a Federal Court only because of diversity of citizenship, the state rule on this question so substantially affects the cause of action that under the rule of *Guaranty Trust Co.* v. *York,* 326 U.S. 99, the District Court as in substance "only another court of the State" should follow the state rule. The Court specifically held that the Arbitration Act was inapplicable because there was no evidence that the petitioner in that case "was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions." 350 U.S. at 201.

Here, to the contrary, it is conceded that the National Labor Relations Act is applicable and that the controversy arose out of activity which affected commerce within the meaning of the decisions of this Court. The *Bernhardt* case, therefore, is of no assistance in determining whether state or federal law governs as to the enforceability of agreements to arbitrate.

There still remains, of course, the question of whether federal or state law is to be regarded as governing the question here presented. As we indicate in our brief in the *Lincoln Mills* case, No. 211, at pages 24-25, we do not think that the appropriate way of deciding that question is to rely on abstract analysis of whether the enforceability of arbitration provisions is to be regarded as a matter of procedure or a matter of substance; it may be either, depending upon the context. Nor do we believe that it is necessary to decide, in general terms, whether state or federal substantive law will govern in Section 301 actions.

We rest simply on a contention that Section 301 and the United States Arbitration Act, taken either together or separately, make it clear that the result here must be that in a suit brought under Section 301 an agreement to arbitrate must be enforceable, irrespective of state law. If it is neces-

sary to categorize this answer, it is possible to say, as innumerable decisions have said, that the enforceability of arbitration agreements is a procedural matter, relating to remedy rather than substance, and that in a Section 301 suit federal rather than state procedure must apply.[2] Or, it is possible to say that the question of the enforceability of an agreement to arbitrate is a substantive one and that, irrespective of the law to be applied in other respects under a Section 301 action, the nature of the objectives sought to be accomplished by Congress in enacting Section 301 are such that it must be construed as making federal substantive law, at least in this respect, applicable.

The form of the answer is immaterial. What is important is the distortion of the plain intention of Congress which would be involved in a contrary result. While much was left unsaid by Congress with respect to Section 301, (and indeed nothing was said with specific respect to the scope of the remedy granted to unions), one thing is transparently clear: Congress intended that any union which agreed that it would not strike during the term of a collective bargaining agreement should be suable in the Federal courts for damages for breach of that agreement, irrespective of state law. We would like, of course, to argue to the contrary. It would certainly be desirable for unions to be able to interpose a state rule of non-liability for such breaches where such rules exist. See *Shirley-Herman Co.* v. *International Hod Carriers,* 182 F. 2d 806, 808-809 (2d Cir., 1950). But we think that, unfortunately, such argu-

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[2] "The [New York] Arbitration Law deals merely with the remedy . . . It does not attempt . . . to modify the substantive maritime law . . ." Brandeis, J., in *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U.S. 109, 124 (1924). The question of enforceability of an agreement to arbitrate is "one of remedy only." Hughes, C. J., in *Marine Transit Corp.* v. *Dreyfus,* 284 U.S. 263, 277 (1931). "The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies." Cardozo, J., in *Matter of Berkovitz* v. *Arbib & Houlberg,* 230 N.Y. 261, ——, 130 N.E. 288 (1921).

ment would be futile—the Congressional intention is too clear.

The agreement to arbitrate disputes arising during the term of an agreement is the counterpart of and consideration for the agreement not to strike. Indeed, the First Circuit has construed an agreement to arbitrate, without a specific no-strike clause, as implying an agreement not to strike. *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, 230 F. 2d 576. See also *United Construction Workers* v. *Haislip*, 223 F. 2d 872, 876 (4th Cir. 1955).

Shall a union be held liable in damages under § 301 for breach of such a clause, irrespective of state law, but be held remediless to enforce it because, under the law of a particular state, such enforcement would not be granted? Such a result seems inconceivable. If an agreement that disputes arising during the contract term shall be settled by arbitration is to be made the basis for assessing damages in a Federal court against a union which called a strike, irrespective of state law, because Congress said that such an agreement was given "statutory recognition . . . as a valid, binding and enforceable contract"[3] by Section 301 then the agreement must also be held to be valid, binding, and, we submit, "enforceable" when the employer violates it. State law must be as irrelevant for the goose as it is for the gander. And this result must be the same whether the agreement not to strike is implied, as a necessary corollary of the agreement to arbitrate, as in the *Mead* case, or expressed separately as in this case.

We do not mean to say that Congress has made it impossible for either party to contract away the remedies provided by § 301. The parties can refuse to negotiate an arbi-

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[3] S. Rep. No. 105, 80th Cong., 1st Sess., p. 17, 1 Legislative History of the Labor-Management Relations Act, 1947 (published by the National Labor Relations Board) p. 423. This collection will hereinafter be cited as "Leg. Hist. (1947)."

tration-no strike provision in the first place. And they can negotiate such a provision but provide that neither party will bring suit against the other in case of a violation. But if they do neither, Congress has provided a remedy in Section 301. That remedy is specifically made available to both parties. And in view of Congress' expressed intention to over-ride state law when an employer sues, a similar intention must be inferred with respect to suits by unions.

II—WHETHER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 GRANTED TO THE DISTRICT COURTS OF THE UNITED STATES EQUITABLE JURISDICTION TO COMPEL SPECIFIC PERFORMANCE OF ARBITRATION CLAUSES IN A COLLECTIVE BARGAINING AGREEMENT.

A. The Question

There are two questions here: (1) whether Section 301 is to be read only as authorizing suits for damages or, on the other hand, as including authority to grant equitable relief where appropriate; (2) whether, assuming that a district court can give equitable relief of some kinds in a Section 301 suit, it is authorized by Section 301 to grant the particular relief of specific performance of an arbitration covenant.

Petitioner in this case, in its brief at pp. 11-16, appears to argue exclusively the first point, viz., the availability of equitable relief of any kind. Petitioner in the *General Electric case,* No. 276, also urges that there are indications that no equitable relief of any kind was meant to be available in a § 301 action. It says, however, that the Court need not decide that question since it is clear that Congress meant to exclude from the scope of § 301 the specific kind of equitable relief here requested—enforcement of an agreement to arbitrate. (Brief for Petitioners in No. 276, pp. 41-48.) We will deal with each of these contentions below.

B. The Argument of Petitioner in This Case—the Claimed Unavailability of Any Equitable Relief

The petitioner in this case, and the petitioner in No. 276, cite several instances in the Congressional debate in which Section 301 was referred to as providing for suits for damages. From this they argue that despite the unrestricted language of Section 301 it should be read as encompassing not simply "suits" but only "suits for damages."

Petitioners in both cases are too modest. They have not argued the full conclusion to which their citation of authority necessarily leads. That conclusion is very simple: Section 301 was not meant to authorize any suits by unions at all. Most of the shorthand expressions upon which the petitioners rely say, in substance, that under Section 301 unions could be sued for damages. Not one refers specifically to a suit by a union or discusses the relief which could be granted in such a suit. It follows therefore, that, on a parity of reasoning with that used by petitioners, the words in Section 301 which say that all "suits for violation of contracts between an employer and a labor organization" may be brought in a federal district court should be ignored and jurisdiction limited only to those cases in which an employer is the plaintiff.

The short answer to arguments based upon this kind of "legislative history," of course, is that none of these statements was formulated as a careful definition of the scope of Section 301. They were shorthand references in which the principal expected application of the proposed section was being used in place of a full description. Even in the few instances where the word "damages" was used without specific limitation to suits against unions, still the intention, plain from the context, was to refer to damages for breach of collective agreements by unions.

This was quite natural. As we point out in our brief in the *Lincoln Mills* case, No. 211, at pp. 43-45, Congress gave and intended to give a remedy to both unions and employers

but the entire Congressional discussion was focused on the cases in which unions would be sued because they violated no-strike clauses in their agreements. And it is true that in such suits only damages could usually be recovered, not because of any limitation in Section 301, but because in most cases, although not necessarily in all, the Norris-LaGuardia Act would prevent an employer from obtaining an injunction.

Naturally, therefore, § 301 was referred to in the discussion as providing for suits for damages, and usually as providing for suits for damages against unions. But no Congressman or Senator said, and no report, either in the House or the Senate said, that unions could *not* sue under § 301 or that, if they sued, they could *not* get equitable relief where appropriate. The legislative history is devoid of a single piece of evidence specifically showing an intention to exclude equitable relief. Indeed, if we have recourse to the actual history of the legislation, rather than the quotation of statements, the contrary plainly appears.

In the House bill what is now Section 301 was Section 302 and what is now Section 301(a) was Section 302(a). But Section 302 of the House bill carried a sub-section which did not appear in the Senate bill or in the bill finally passed. This was Section 302(e). It provided that in actions brought under Section 302(a) the Norris-LaGuardia Act should not be applicable![4] Clearly, then, the House thought that Section 302(a) encompassed equitable relief. Otherwise, the provision with respect to Norris-La Guardia made no sense.

The Senate bill, as stated, did not contain the House provision making the Norris-LaGuardia Act inapplicable. And, in conference, the Senate's views prevailed; the House provision was deleted. But surely this sequence cannot be read as providing a basis for arguing that no jurisdiction to

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[4] H.R. 3020, 80th Cong., 1st Sess., as passed House; 1 Leg. Hist. (1947) p. 222.

grant equitable relief was being granted. To the contrary, the only permissible inference is that the bill which finally passed permitted equitable relief except in the cases where it would be barred by Norris-LaGuardia.

This has been the unanimous opinion of every Court of Appeals which has passed upon the question. Concededly some have held that specific performance of an agreement to arbitrate cannot be obtained under Section 301 if the law of the applicable state would not grant such relief, but neither the First,[5] the Third,[6] the Fifth,[7] the Sixth,[8] nor the Seventh[9] Circuits have expressed any doubt in holding, or assuming, that equitable relief would be available in a Section 301 suit in appropriate cases.

C. The Argument of Petitioner in the *General Electric* Case —the Claimed Intention of Congress Not to Permit Enforcement of Arbitration in Collective Agreements

In *General Electric* v. *Local 205*, No. 276, the petitioner argues that it is unnecessary to decide whether Section 301 authorizes equitable relief in general because, as petitioner puts it: "Congress specifically considered and decided against providing for the enforcement of arbitration agreements."[10] Indeed, petitioner there says, Congress "fully aware of the problems of arbitration in the labor field deliberately stopped short of providing enforcement through judicial or other process."[11]

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[5] *Local 205* v. *General Electric Co.*, 233 F. 2d 85 (1956), No. 276 this Term.

[6] *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (1956).

[7] *Textile Workers* v. *Lincoln Mills of Alabama*, 230 F. 2d 81 (1956), No. 211 this Term.

[8] *Milk & Ice Cream Drivers* v. *Gillespie Milk Products Corp.*, 203 F. 2d 650 (1953).

[9] *United Steelworkers of America* v. *Galland-Henning Mfg. Co.*, 39 LRRM 2384 (7th Cir., Fed. 4, 1957).

[10] Brief for Petitioner in No. 276, p. 45.

[11] *Id.* at p. 48.

If these statements are correct, this branch of the case is over. If there is any evidence that Congress considered the common law rule of non-enforceability of arbitration agreements, regarded it as applicable to collective agreements, and consciously limited the provisions of Section 301 so as not to change that rule, then the statute should obviously be construed in the light of that intention.

The plain fact is that these statements are not correct. There is not one single suggestion in the legislative history of Section 301 that Congress adverted at all to the common law rule against the enforceability of arbitration agreements. Nor is there even a hint that Congress thought that this rule was applicable to grievance arbitration under collective agreements or would be relevant in a Section 301 suit. Consequently, there is simply no evidence that Congress considered that agreements to arbitrate grievances would not be enforceable in a § 301 suit.

What, then, is the basis for the argument of petitioner in No. 276? Disregarding for the moment the use of materials dealing with other subjects (for which see, below, pp.——), the argument comes down to this. The original Senate bill not only contained § 301 but also contained in Sections 8(a)(6) and 8(b)(5) provisions making it an unfair labor practice to violate the terms of a collective agreement or an agreement to submit a labor dispute to arbitration.[12] If these provisions had been enacted, obviously something like a decree for specific performance of an agreement to arbitrate grievances could have eventuated. This is so because the National Labor Relations Board always proceeds by way of a cease and desist order which can be enforced in a Court of Appeals, not by way of a remedy in damages. But these provisions were deleted in conference. Therefore, it is concluded, Congress decided

[12] H.R. 3020 as passed by the Senate; 1 Leg. Hist. (1947) 239, 241-242. The House bill would have had the same effect by virtue of its definition of the duty to bargain collectively in Section 2(11)(A); 1 Leg. Hist. (1947) 163.

that agreements to arbitrate grievances should not be specifically enforceable under § 301.

This argument assumes, first, that Congress was aware that specific performance would not be available in a § 301 suit and, second, that the reason the unfair labor practice provisions were dropped was to retain that result. Neither assumption is correct. Indeed, the report of the Senate Committee makes it quite clear that the unfair labor practice provisions were inserted simply to provide another forum, in addition to that being provided by § 301, to deal with the same subject. As the report says:

> "While Title III of the Committee bill treats this subject by giving both parties rights to sue in the United States District Court, the committee believes that such action should also be available before an administrative body." [13]

The minority objected to providing this choice of forums. As they put it:

> ". . . sections 8(a)(6) and 8(b)(5) together with section 301 would give rise to a conflict of jurisdiction between the National Labor Relations Board and the United States district courts. This latter section permits suits in the United States district courts for violations of collective bargaining agreements. Parties to such agreements thus have the choice of bringing their action before the Board or the United States district courts. Obviously, the necessity for uniform decisions in such matters and the avoidance of conflicting decisional rules by judicial bodies make this legislative scheme wholly undesirable." [14]

The views of the minority were not persuasive in the

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[13] S. Rep. No. 105, 80th Cong., 1st Sess., pp. 20-21; 1 Leg. Hist. (1947) pp. 426-427.

[14] *Id.*, Pt. 2 (Minority Views) p. 13; 1 Leg. Hist. (1947) 475.

Senate. But similar fears were again expressed by the House conferees when the bill went to conference. As Senator Taft explained:

> "The House conferees objected to this provision on the ground that it would have the effect of making the terms of every collective agreement subject to interpretation and determination by the Board, rather than by the courts." [15]

Therefore, he said, the Senate conferees agreed to its deletion. Section 301, however, was retained. "If both provisions had remained, there would have been a probable conflict of remedies and decisions."[16]

The House Conference Report expressed substantially the same thought in explaining the deletion of the Senate's unfair labor practice provision:

> "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." [17]

It is simply not possible to read this history as constituting either Congressional recognition that grievance arbitration could not be compelled in a § 301 suit or a Congressional decision that it should not be so compelled. To the contrary, if anything can be gleaned from these materials it is that Congress was not aware of any significant difference in the scope of the remedies which would be available under § 301 and the proposed Sections 8(a)(6) and 8(b)(5) and

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[15] 93 Cong. Rec. 6443; 2 Leg. Hist. (1947) 1539. This same analysis is cited by petitioner in No. 276 as "93 Cong. Rec. 6600." The difference in pagination probably results from the use by petitioner of the compilation published by the NLRB which reproduced the pages of the daily Congressional Record before revision and re-pagination.

[16] *Ibid.*

[17] House Conf. Rept. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 42; 1 Leg. Hist. (1947) 546.

it has made. And, at least to a degree, the Federal courts will not be faced with the burden of deciding "a potential flood of grievances based upon an employer's failure to comply with the terms of a collective agreement relating to compensation [which are] peculiar in the individual benefit which is their subject matter . . ." 348 U.S. at 460 (Frankfurter, J.).

VI—WHETHER AN ORDER OF A DISTRICT COURT UNDER § 4 OF THE ARBITRATION ACT, DIRECTING THE PARTIES TO PERFORM AN AGREEMENT TO ARBITRATE, IS A "FINAL" DECISION FROM WHICH AN APPEAL MAY BE TAKEN UNDER 28 U.S.C. 1291.

This question must be decided here only if the Court should hold, in agreement with the First Circuit, that the agreement to arbitrate grievances is not enforceable by virtue of Section 301 standing alone, but is only enforceable because the remedies provided for in the Arbitration Act can be applied in a Section 301 suit. If the Court should rule, as we urge, that the agreement to arbitrate here is enforceable as an essential part of the no strike-arbitration provision which Congress meant to be enforceable in the Federal courts, this issue disappears. For, in that event, it is clear that arbitration is not simply a step in the ultimate judicial enforcement of a claim but is the full and final relief requested by the plaintiff. No question could possibly be raised that an order which gives the plaintiff all of the relief he asks in his complaint is not a final order within the meaning of 28 U.S.C. § 1291. And, in any case, the order to arbitrate, being an injunctive order is clearly appealable even if interlocutory under the provisions of 28 U.S.C. § 1292(1).

If, on the other hand, this Court should treat grievance arbitration in the same manner as commercial arbitration is treated under the Arbitration Act, then there seems to be a serious question as to the appealability of a District Court

order directing that arbitration proceed. The Second Circuit has held that an order directing arbitration under Section 4 of the Arbitration Act is not appealable. This was clearly held in re *Pahlberg Petition,* 131 F. 2d 968 (1942), as well as in *Stathatos* v. *Arnold Bernstein SS Corp.,* 202 F. 2d 525 (1953). The earlier decision of the Second Circuit in *Krauss Bros. Lumber Co.* v. *Bossert,* 62 F. 2d 1004 (1933) is apparently regarded by the Second Circuit as no longer good law, since it was decided before this Court's decisions in the *Enolow* case[32] and the *Shanferoke Coal* case.[33] Indeed, this Court in *Schoenamsgruber* v. *Hamburg American Line,* 294 U.S. 456, affirmed a decision of the Ninth Circuit which it accepted for review on the claim of conflict with the Second Circuit's decision in the *Krauss Bros.* case.

There can be no question that under the rule of *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176, an order staying a proceeding pending arbitration is not appealable except in the case in which the proceeding being stayed is a proceeding at law. In the latter case, the stay order is regarded as the equivalent of an independent injunction by a court of equity against the pending proceedings at law and is therefore appealable as an interlocutory injunction. If the original cause of action is equitable in nature, the stay pending arbitration is regarded merely as a step in the litigation of the original cause of action.

The basis for the Second Circuit's most recent position seems to be that the same rule should be applied in any case in which arbitration is directed, whether or not the first step is the filing of a suit, which is stayed pending arbitration, or is a petition to compel arbitration. See *Stathatos* v. *Arnold Bernstein SS Corp.,* 202 F. 2d 525, at 527. ("There seems to be no grounds for distinctions here based

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[32] *Enolow* v. *New York Life Insurance Co.,* 293 U.S. 379.

[33] *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.,* 293 U.S. 449.

upon the procedural mechanics which lead to the orders.")

We express no opinion on this subject as it applies to commercial arbitration. As we indicated to the Court in our Memorandum on Certiorari the issue was raised *sua sponte* by the Court of Appeals.

We do believe, however, that the issue serves to emphasize our view that grievance arbitration is so different from commercial arbitration that the common law rule against enforceability is simply inapplicable to it. It is simply not sensible to regard the order directing arbitration here as simply a procedural order adopted in the action in place of a trial at common law. The arbitration here sought was not agreed upon as a method of avoiding litigation or simplifying the trial of issues which might arise during the course of the agreement. It was adopted as a substitute for the only other method which a union can reserve in order to protect the contract which it has negotiated—the right to strike. The agreement should be enforced as such and without reference to doctrines evolved to deal with an entirely different kind of an agreement. If it is so enforced, we concede the order granting enforcement is applicable.

CONCLUSION

For the reasons above set forth it is respectfully submitted that the decision below should be affirmed.

SIDNEY W. WERNICK
85 Exchange Street
Portland, Maine

ARTHUR J. GOLDBERG
DAVID E. FELLER
1001 Connecticut Ave., N.W.
Washington 6, D. C.
Attorneys for Respondents